Supreme Court, U.S.
FILED
JUL
19 2001
OFFICE OF THE CLERK

No. 00-1214

IN THE

Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE STATES OF TEXAS, OHIO, MONTANA, NEBRASKA, DELAWARE, LOUISIANA, AND VIRGINIA, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should the right to State-appointed counsel, which this Court has recognized under the Sixth Amendment but has limited to cases of "actual imprisonment," be extended to misdemeanor offenders who are never imprisoned but instead receive a suspended sentence?

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INTERESTS OF *AMICI CURIAE*

Amici Curiae are States[1] that oppose further expansion of the federal right to State-appointed counsel that was first adopted, as to felony cases, in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). As a matter of State law, some States provide appointed counsel to indigent defendants in all or virtually all misdemeanor cases. Others provide such a right only in relatively serious misdemeanor cases, such as those in which the maximum potential punishment includes imprisonment greater than a certain duration. Still others provide State-appointed counsel to misdemeanor defendants only when required to do so by this Court's decisions in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), and *Scott* v. *Illinois*, 440 U.S. 367 (1979). Those decisions hold that a misdemeanor defendant has a Sixth Amendment right to appointed counsel only when the proceeding results in "actual imprisonment," not when it results in a lesser punishment such as a fine, probation or a mere "threat of imprisonment." *Id.* at 373.

Regardless of the prevailing practices in their own States, *amici* believe that, aside from these established federal parameters, the right to appointed counsel in State proceedings should be determined as a matter of State law, not as a matter of federal constitutional right. Recent statistics from the U.S. Department of Justice indicate that the States already pay well over $1.2 billion annually for appointed counsel. The States, through their elected representatives, should determine whether to spend additional State funds on appointed counsel rather than on other pressing governmental priorities. *Amici* also believe it would be unseemly and unwise to require them, as a matter of federal law, to provide counsel to indigent defendants for

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[1] As States, *amici* are not required to seek leave to file an *amicus curiae* brief. *See* Sup. Ct. R. 37.4.

misdemeanor cases in which most non-indigent defendants would not even bother to retain a lawyer. See *Argersinger*, 407 U.S. at 50 (Powell, J., concurring in result).

Extending the right to State-appointed counsel could have other harmful effects on *amici* and their citizens. For example, as Justice Powell noted in his *Argersinger* concurrence, an expanded right to State-appointed counsel likely would produce "over lawyering" of relatively minor cases, thereby "stretching out . . . the process with consequent increased costs to the public." *Id.* at 58-59 (Powell, J., concurring in result). Such an expansion, moreover, could require the States to provide trained prosecutors for cases that are now effectively prosecuted by police and other non-lawyers. *Id.* Finally, invalidating suspended sentences on the ground that the defendants lacked appointed counsel would interfere with the operation of State probation systems and recidivism rules, thereby subjecting the citizens of some States to an increased risk of crime by repeat offenders.

For these reasons, and others discussed below, *amici* oppose the effort by the Supreme Court of Alabama in this case, and a few courts in other cases, to extend the federal right to State-appointed counsel to misdemeanor defendants who are never imprisoned, but who receive suspended or conditional sentences.

SUMMARY OF ARGUMENT

In *Scott*, this Court reiterated the holding of *Argersinger* that, under the Sixth Amendment (as applied to the States through the Fourteenth Amendent), "incarceration [is] so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense." *Scott* v. *Illinois*, 440 U.S. 367, 372-73 (1979). The Court further explained that "the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the

mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.* at 373.

Notwithstanding this "bright line between imprisonment and lesser criminal penalties," *Nichols* v. *United States*, 511 U.S. 738, 750 (1994) (Souter, J., concurring in judgment), the Supreme Court of Alabama and a few other courts have held that *Scott* also makes it unconstitutional for trial courts to impose suspended or conditional sentences in misdemeanor cases involving uncounseled defendants. See Pet. App. 8-11; 34 (collecting cases). In so holding, these decisions have seized upon the statement in *Scott* that "no indigent criminal defendant [can] be *sentenced* to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 440 U.S. at 374 (emphasis added). Reasoning that a suspended or conditional sentence is still a "sentence of imprisonment," these decisions hold that such sentences violate the Sixth Amendment even when no incarceration results.

But this reading of *Scott*—like the interpretation of the Sixth Amendment on which it rests—is patently incorrect.

I. First, it is contrary to this Court's decisions interpreting that Amendment, especially *Argersinger* and *Scott* themselves. This Court's earliest known decision expressly interpreting the Sixth Amendment right to counsel concluded that, although the Sixth Amendment guarantees a defendant's right to retain counsel on his own, it did not create a "general obligation on the part of the *government* . . . to . . . retain counsel for defendants." *United States* v. *Van Duzee*, 140 U.S. 169, 173 (1891) (emphasis added), *on rehearing on another point*, 140 U.S. 199 (1891).

To be sure, the Court later departed from this understanding when it concluded that the Sixth and Fourteenth Amendments impose such an obligation with respect to felony proceedings.

See *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938) (federal trials); *Gideon* v. *Wainwright*, 372 U.S. 335, 339 (1963) (State trials). And this right was, of course, extended to certain misdemeanors in *Argersinger*. But *Argersinger* and its progeny make perfectly clear that the right so recognized is limited to misdemeanor cases that "*end up* in the *actual* deprivation of a person's liberty." 407 U.S. at 40 (emphases added).

Nothing in *Scott* purports to expand the class of misdemeanors that qualify for State-appointed counsel. Indeed, the defendant in *Scott* was neither sentenced to nor served any term of imprisonment. While the statute he was accused of violating authorized both a fine and a term of imprisonment, he was only sentenced to pay a fine. Accordingly, the Court's reference to a defendant's being "sentenced to a term of imprisonment" is properly read as an effort to distinguish a fine from an actual imprisonment, not as an effort to broaden the holding of *Argersinger*. As ably shown by petitioner, moreover, this conclusion is consistent with the clear weight of authority in other courts, both State and federal.

II. Even if *Argersinger* and *Scott* did not squarely foreclose the Supreme Court of Alabama's extension of the right to appointed counsel, such an extension should be rejected in light of the language and history of the Sixth Amendment. The Amendment's plain language—providing that an "accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"—suggests no right to counsel funded or provided by the government. For that and other reasons, as the *Scott* Court noted, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused . . . to *employ* a lawyer to assist in his defense." 440 U.S. at 370 (emphasis added) (citing William M. Beaney, *The Right to Counsel in American Courts* 27-30 (Greenwood 1972) (1955)).

Indeed, as the Court explained in *Argersinger*, the fundamental problem addressed by the Sixth Amendment's right to counsel provision had nothing to do with the inability of indigent defendants to retain counsel. Rather, the problem was that under English common law, "'parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel'" while "'a person charged with treason or felony was denied the aid of counsel,'" even when he was willing and able to retain one. 407 U.S. at 30. Careful examination of the pertinent historical materials confirms that the Sixth Amendment's original meaning was limited to filling that particular gap.

Perhaps the most instructive piece of historical evidence is a statute passed by the first Congress in 1790, almost contemporaneously with its passage of the Bill of Rights. That statute provided that a defendant "indicted of treason" or "other capital offenses"—and no other crimes—would be entitled to have "*assign*[*ed*] to such person such counsel, not exceeding two, as such person shall desire." Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118. If the first Congress had interpreted the Sixth Amendment as providing a right to *appointed* counsel in "all criminal prosecutions," this statute would have been at once redundant and under-inclusive. Accordingly, its passage clearly indicates that the first Congress interpreted the Sixth Amendment as providing only a right to retained counsel, paid for by the defendant himself.

But even if the Sixth Amendment could have been viewed as having a broader meaning, its reach could not possibly have extended to misdemeanor cases, particularly those in which no incarceration was actually imposed. The historical evidence suggests that only a few States gave any criminal defendants a right to appointed counsel. Even then, that right extended only to those accused of felonies, and usually only to capital offenses. The "right to counsel" in the proposed Sixth Amendment would doubtless have elicited a public outcry, or at least significant debate, if it had been viewed as

creating a right broader than that created by even the most expansive State statutes. And, of course, the fact that some States provided some right to appointed counsel while other States did not shows that the Framers knew how to create such a right if they wished to do so.

III. This Court should also refuse to expand the right to State-appointed counsel beyond that recognized in *Argersinger* and *Scott* because doing so would impose significant burdens on the States without any assurance of significant additional benefit to misdemeanor defendants. As outlined above, such an expansion would perversely require that State resources be used to provide counsel in cases where most defendants would not even obtain counsel for themselves. It would increase burdens on already over-burdened State courts and prosecutors' offices throughout the Nation. And it would jeopardize the operation of State probation policies and recidivism statutes, thereby putting the public safety at risk.

In short, this Court should reject the expansion of the right to appointed counsel countenanced by the court below, and should enforce the limitations already established in *Argersinger* and *Scott*.

STATEMENT OF FACTS

Amici adopt the statement of facts presented in the petitioner's brief.

ARGUMENT

The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. At bottom, the question in this case is whether, as the Supreme Court of Alabama held, this provision provides a right to State-appointed counsel in a misdemeanor proceeding that results in

a suspended or conditional sentence of incarceration, but no actual imprisonment. As explained below, there is no basis for such a right in this Court's decisions, in the Amendment's text and history, or in sound public policy.

I. THIS COURT'S "ACTUAL IMPRISONMENT" JURISPRUDENCE SQUARELY FORECLOSES EXTENDING THE FEDERAL RIGHT TO STATE-APPOINTED COUNSEL TO MISDEMEANOR CASES THAT RESULT IN SUSPENDED SENTENCES BUT NO JAIL TIME.

Although this Court's reading of the Sixth Amendment has, since the 1930s, departed from the Amendment's strict text and history, and indeed from this Court's own early interpretation (see *infra*, Section II), the Court consistently has held that the right to State-appointed counsel in misdemeanor cases is limited. And the Court consistently has ruled that "the line should be drawn between criminal proceedings that *resulted in* imprisonment, and those that did not." *Nichols* v. *United States*, 511 U.S. 738, 746 (1994) (citing *Scott* v. *Illinois*, 440 U.S. 367, 372 (1979)) (emphasis added).

The Supreme Court of Alabama crossed over this line in holding that a suspended sentence triggers the right to State-appointed counsel even though it does not "result in imprisonment." The court justified its holding by attempting to read this Court's opinion in *Scott* as though it were a statute. Cf., *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("the language of an opinion is not always to be parsed as though we were dealing with language of a statute"); *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 515 (1993) (criticizing the practice of "dissect[ing] the sentences of the United States Reports as though they were the United States Code"). Specifically, the Alabama court pointed to the statement that "no indigent criminal defendant [can] be *sentenced* to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Scott* v. *Illinois*, 440 U.S. 367, 373-74 (1979)

(emphasis added); see Pet. App. 32. The court below then reasoned that, because a suspended or conditional sentence is still a "'sentence of imprisonment,'" such a sentence is invalid under *Scott* even though it does not actually result in imprisonment. See Pet. App. 34-35. But this conclusion, based on one isolated sentence in the *Scott* opinion, is impossible to square with this Court's precedents.

1. To begin with, the lower court's interpretation of *Scott* is flatly contrary to *Argersinger*, which both established and delimited the right to State-appointed counsel in misdemeanor cases. In *Argersinger*, the Court held that absent a waiver, "no person may *be imprisoned* for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972) (emphasis added).[2] The Court further emphasized that "[u]nder the rule we announce today, every judge will know when the trial of a misdemeanor starts that *no imprisonment may be imposed*, even though local law permits it, unless the accused is represented by counsel." *Id.* at 40 (emphasis added).

The Court thus recognized the apparent oddity in the fact that the right to appointed counsel, which must be provided at the outset of the criminal proceedings, is judged by reference to the ultimate disposition of the case. But, as the Court noted, this approach essentially puts the issue in the control of the State and the court, and forces them to live with the choice they make prior to trial. If the State believes that the offense potentially warrants a prison sentence, or if the court wishes to preserve the option of imposing an actual jail term, the State must provide counsel. If, however, both the State and the court expect a penalty not involving incarceration, the indigent defendant is fully protected: He can retain counsel if he wishes but, given the unavailability of prison time as a

[2] In that case, the defendant was sentenced to serve 90 days in jail. *Argersinger* v. *Hamlin*, 407 U.S. 25, 26 (1972).

sentencing option, it is almost certain that he will proceed as any other defendant ordinarily would—without the assistance of counsel.

Accordingly, the Court specifically acknowledged in *Argersinger* that "[t]he run of misdemeanors will not be affected" by its decision. *Id.* That was because, under the Court's holding, only "those that *end up* in *actual deprivation* of a person's liberty" will trigger the right to appointed counsel. *Id.* (emphases added). Thus, for example, according to the Court, "[t]he fact that traffic charges technically fall within the category of 'criminal prosecutions' does not necessarily mean that many of them will be brought into the class . . . where imprisonment actually occurs," thereby triggering the right to State-funded representation in that inevitably large number of cases. *Id.* at 38. The court below neither cited nor discussed these key portions of the *Argersinger* opinion.

Obviously, a misdemeanor case that produces a suspended or probated sentence does not ordinarily "end up" in any "actual deprivation of a person's liberty." Nor, as in this case, does it ordinarily create a situation in which "imprisonment actually occurs." The decision of the court below thus cannot be squared with *Argersinger*'s holding or its rationale.

2. The same is true of *Scott* itself. There, the Court emphasized that imprisonment—the starkest deprivation of personal liberty—is distinct from lesser deprivations of liberty and property and warrants particular Sixth Amendment protection. *Scott* involved a misdemeanor conviction in which the offender was sentenced to pay a fine. No incarceration was imposed, although it would have been permitted by the governing State statute. The Court rejected the defendant's argument that counsel is mandated whenever a statute authorizes the imposition of imprisonment, even though none is, in fact, imposed. *Scott*, 440 U.S. at 368-69. The Court also rejected the contention that lesser deprivations

of liberty and property trigger a right to State-appointed counsel. *Id.* at 372-73.

In so doing, the Court reviewed *Argersinger* at some length. The Court emphasized that *Argersinger* had "conclu[ded] that *incarceration* [is] so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense." *Id.* (emphasis added). The Court also pointed out that the *Argersinger* opinion "repeatedly referred to trials 'where an accused is deprived of his liberty,' and to 'a case that actually leads to imprisonment even for a brief period.'" *Id.* at 373 (citation omitted) (quoting *Argersinger*, 407 U.S. at 32, 33). The Court further explained that "[e]ven were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.*

This distinction—between "actual imprisonment" and a "mere threat of imprisonment"—forecloses the Supreme Court of Alabama's view that a suspended sentence triggers the right to State-appointed counsel. Just as the mere *possibility* of a court's imposing a statutorily permitted term of incarceration constituted a "mere threat" of imprisonment in *Scott*, so too does the possibility that a suspended sentence will ultimately result in incarceration. In both cases, incarceration is still a "threat." It is not "actual incarceration."[3]

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[3] Other courts have held that the "mere threat of imprisonment" language in *Scott*, "can only be read to include suspended sentences." *See, e.g., United States* v. *Smith*, No. 94-5627, 1995 WL 314892, at **2 (6th Cir. May 23, 1995) (per curiam) (unpublished disposition), *cert. denied*, 516 U.S. 897 (1995); *cf.* Sheldon Krantz et al., *Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin* 30 (1976) ("A suspended sentence places no conditions upon a defendant and, if the sentence is never imposed, it will have no effect" on a defendant's liberty; "[a]s long as the sentence is not imposed, the defendant is in no way restricted by the action of the court."). Moreover, as the Texas Court of Criminal Appeals has persuasively explained, in any case "in which one convicted of a misdemeanor and assessed a fine faces the possibility that he may later be subject to imprisonment if he refuses to pay the assessed fine[,] [t]his sort of likelihood is no more than the mere threat of imprisonment addressed by the [C]ourt in *Scott*." *Fortner* v. *State*, 764 S.W.2d 934, 935 (Tex. App. 1989); *see also, e.g., People* v. *Reichenbach*, 587 N.W.2d 1, 6 (Mich. 1998) (rejecting defendant's contention that "a conditional sentence, under which he might have been imprisoned had he not paid the fine, constitutes 'actual imprisonment' under *Argersinger*" because "the prospect of imprisonment was never more than a threat").

To be sure, as the Supreme Court of Alabama noted, the Court in *Scott* went on to state in passing that "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be *sentenced* to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.* at 373-74 (emphasis added). However, that comment came in the context of a case in which the statute authorized both a fine and a sentence of imprisonment, but in which only a fine had been imposed by the lower court. The Court's language, occurring as it did in a case in which no sentence of incarceration was imposed, cannot fairly be read to suggest that the mere imposition of a suspended sentence poses the sort of deprivation of liberty recognized in *Scott* and *Argersinger* as triggering constitutional protection.

Accordingly, the Court's reference to "sentenc[ing]" to a "term of imprisonment" is best understood as a shorthand way of distinguishing a mere fine from an actual deprivation of liberty.[4] That reference could not have been intended to

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[4] The United States Sentencing Guidelines provide analogous support for a distinction between the suspension of a "sentence of imprisonment" and the deprivation of liberty as a consequence of actual incarceration. *See* U.S.S.G. § 4A1.2(b) (2000). Significantly, the Guidelines, promulgated after *Scott*, expressly exclude a suspended sentence from the definition of "sentence of imprisonment": "If part of a sentence of

expand the right to State-appointed counsel beyond that established in *Argersinger*.

3. The lower court's reading of *Argersinger* and *Scott* is also foreclosed by this Court's subsequent characterizations of that opinion. For example, in *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), a case not addressed by the court below, the Court expressly relied upon those two decisions in observing that the Court "has refused to extend the right to appointed counsel to include prosecutions which, though criminal, do not *result* in the defendant's loss of personal liberty." *Id.* at 26 (emphasis added). And Justice Blackmun, in dissent, correctly characterized *Scott* as holding that "the right to counsel is not constitutionally mandated when imprisonment is not actually imposed." *Id.* at 36 n.1 (Blackmun, J., dissenting).

Likewise, in *Nichols* v. *United States*, 511 U.S. 738 (1994), the Court characterized *Scott* as holding that "so long as no imprisonment [i]s actually imposed, the Sixth Amendment right to counsel d[oes] not obtain," and that "the line should be drawn between criminal proceedings that *resulted in* imprisonment, and those that did not." *Id.* at 746 (emphasis added). In his separate concurrence, Justice Souter agreed that *Scott* "drew a bright line between imprisonment and lesser criminal penalties." *Id.* at 750 (Souter, J., concurring in judgment). Although the Supreme Court of Alabama discussed *Nichols*, it did not acknowledge this critical language from either the majority or the concurring opinion. See Pet. App. 33 n.4.

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imprisonment was suspended, 'sentence of imprisonment' refers only to the portion that was not suspended." *Id.* § 4A1.2(b)(2). Moreover, the commentary to that provision states that "[t]o qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence." *Id.* § 4A1.2 Commentary Application Note 2.

The same characterization of *Scott* was repeated in *M.L.B.* v. *S.L.J.*, 519 U.S. 102 (1996), which involved the appellate rights of indigents. Citing *Scott*, the Court noted that "the right to counsel at state expense, as delineated in our decisions, is less encompassing" than other rights facilitating access to a State's courts. *Id.* at 112-13. As the Court put it, "A State must provide trial counsel for an indigent defendant charged with a felony, . . . but that right does not extend to nonfelony trials if no term of imprisonment is *actually imposed*." *Id.* (emphasis added) (citation omitted).

Similarly, in *Martinez* v. *Court of Appeal of California*, 528 U.S. 152, 154 (2000), the Court cited *Scott* for the proposition that "[t]he Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted *and punished by imprisonment*." *Id.* (emphasis added). And just last Term, in *Glover* v. *United States*, 531 U.S. 198 (2001), a unanimous Court cited *Argersinger* and *Scott* for the proposition that "any amount of actual jail time has Sixth Amendment significance." *Id.* at 203.

In contrast to *Lassiter*, *Nichols*, *M.L.B.*, *Martinez*, and *Glover*, the lower court's interpretation of *Scott* would trigger a right to State-appointed counsel even when the proceeding did not "result in" or "actually impose" imprisonment, and the defendant therefore is not actually "punished by imprisonment." That interpretation of *Scott* thus cannot be squared with these decisions.

II. THE SIXTH AMENDMENT'S TEXT AND HISTORY, AS WELL AS EARLY INTERPRETATIONS OF THAT PROVISION BY THE FIRST CONGRESS AND THIS COURT, MILITATE AGAINST ANY FURTHER EXTENSION OF THE RIGHT TO STATE-APPOINTED COUNSEL.

The text and history of the Sixth Amendment also militate strongly against any extension of the right to State-appointed counsel. As this Court recognized in *Scott*, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." *Scott* v. *Illinois*, 440 U.S. 367, 370 (1979). Indeed, there appears to be no serious dispute among legal scholars and historians that the Amendment, as enacted, provided nothing more than a right of an accused to the assistance of his or her own, personally funded counsel and in no way mandated that counsel be provided by the government, be it federal or State. See, *e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 114 (1998) ("[T]he Sixth Amendment gave the accused some freedom, some autonomy, in controlling the shape of 'his defence' [including] . . . whom (if anyone) to hire as a lawyer."); Anthony Lewis, *Gideon's Trumpet* 110 (Vintage Books 1989) (1964) ("Historically speaking, the amendment was almost certainly not envisaged by its framers as reaching the problem of the man too poor to hire a lawyer for his defense.").

Amici recognize, of course, that the Court departed from this understanding of the Sixth Amendment some 70 years ago. In *Powell* v. *Alabama*, 287 U.S. 45 (1932), the Court held that in some circumstances, which the Court said would be determined on a case-by-case basis, "the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel." *Id.* at 72. Six

years later, the Court interpreted the Sixth Amendment to require the appointment of counsel in all federal cases where a defendant's "life or liberty is at stake." *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938). However, for the next 25 years, the Court refused to incorporate this interpretation of the Sixth Amendment against the States. Instead, it adhered to its holding in *Betts* v. *Brady*, 316 U.S. 455, 461-62 (1942), that "[t]he Sixth Amendment of the national Constitution applies only to trials in federal courts," and that due process required appointed counsel in State cases only where necessary to avoid "a denial of fundamental fairness, shocking to the universal sense of justice." But in 1963, the Court, in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), overruled *Betts* and held that the Sixth and Fourteenth Amendments provide indigent defendants a right to State-provided counsel in felony proceedings. *Id.* at 344-45.

Amici have no quarrel with that settled precedent. Nevertheless, in deciding whether to extend the right recognized there beyond the limits imposed in *Scott* and *Argersinger*, the Court should be mindful of the pertinent textual and historical evidence. That evidence includes (a) the English common law as it existed just prior to the adoption of the Sixth Amendment; (b) the Framers' decision not to follow State laws that expressly provided a right to appointed counsel in certain circumstances; (c) the interpretation of the Amendment's right-to-counsel provision by the first Congress; and (d) this Court's earliest interpretations of that same provision. These materials show beyond any serious doubt that the Sixth Amendment was not viewed as granting any right to government-provided representation.

A. The Amendment's Right-To-Counsel Provision Represented An Affirmative Rejection Of The English Common Law, Which Severely Limited A Defendant's Ability To Retain Counsel.

The Sixth Amendment's right-to-counsel provision was a response to the traditional English common-law rule, which severely limited the assistance of counsel in serious criminal cases. Under that rule, "a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest." *Powell*, 287 U.S. at 60; see William M. Beaney, *The Right to Counsel in American Courts* 8-10 (Greenwood 1972) (1955). By contrast, "parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel." *Powell*, 287 U.S. at 60. Thus, as this Court has recognized, the English rule "perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors." *Scott*, 440 U.S. at 372; *Powell*, 287 U.S. at 60 (noting that the English rule was "outrageous" in that it gave "the right to the aid of counsel in petty offenses" but not "in the case of crimes of the gravest character, where such aid is most needed").

Contemporaneous commentators also challenged the English rule. Blackstone inquired: "Upon what face of reason can that assistance be denied to save the life of a man, which is yet allowed him in prosecutions for every petty trespass?" 4 William Blackstone, *Commentaries on the Laws of England* 355 (12th ed. 1795), *quoted in* Beaney, *supra*, at 11. And Zephaniah Swift referred to the English rule as a "cruel and illiberal principle." 2 *A System of Laws of the State of Connecticut* 398-99 (1795-96).

Because of the absurdity of the English rule, many Colonies abandoned it before the Sixth Amendment even was drafted. See *Betts*, 316 U.S. at 465 (noting that that Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, and Pennsylvania had abandoned the English Rule

before the Sixth Amendment was adopted). As this Court has explained, in "light of th[e] common law practice, it is evident that the[se] constitutional provisions . . . were intended to do away with" that rule. *Id.* at 466. Or, as one commentator recently put it, the intent of the Framers "was clearly to abrogate this perverse English common law rule by constitutional amendment and to provide the defendant with the right to be represented by counsel, presumably of his own choice and at his own expense." B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged With Misdemeanors Entitled To Court Appointed Counsel?*, 5 Roger Williams U. L. Rev. 417, 425-26 (2000).

B. The Amendment's Framers Deliberately Did Not Include An Express Right To Government-Provided Counsel Even Though Some States Provided Such A Right In Limited Cases.

While making a decisive break with the English rule, the Sixth Amendment did not adopt the more expansive right to appointed counsel already recognized by some States. In fact, a comparison of the language of the Sixth Amendment with the language of contemporaneous State statutes mandating appointed counsel reveals that the Sixth Amendment's drafters deliberately avoided creating any right to appointed counsel.

When the Sixth Amendment was drafted, apparently only Connecticut and New Jersey appointed counsel for defendants facing felony indictments generally.[5] See *Betts*, 316 U.S. at 467 n.20. New Jersey's first constitution and an early statute guaranteed "assigned counsel" to indigent criminal defendants accused of "indictable offenses," which were limited to capital crimes and felonies. *See* Robert Martin &

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[5] In Connecticut, according to one commentator, "the custom of appointing counsel if the accused requested this assistance apparently existed after 1750." Beaney, *supra*, at 16. We are, however, unaware of any evidence suggesting that this custom extended beyond felonies.

Walter Kowalski, *A Matter of Simple Justice: Enactment of New Jersey's Municipal Public Defender Act*, 51 Rutgers L. Rev. 637, 644 & n.37 (1999); Acts of the General Assembly of N.J. 1012 (1791-96), *quoted in* Beaney, *supra*, at 20 (requiring courts, upon an indictment, to "assign to [defendant], if not of ability to procure counsel, such counsel, not exceeding two, as he or she shall desire").

Another five States provided counsel for defendants only in capital cases. See *Betts*, 316 U.S. at 467 n.20 (Delaware, Pennsylvania, Massachusetts, and New Hampshire); Beaney, *supra*, at 17 (South Carolina). Like New Jersey, these States did so through explicit statutory language providing for "assigned" counsel.[6] Moreover, these appointed counsel provisions supplemented more general statutory language

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[6] *See, e.g.*, 3 Statutes at Large of Pa. 199 (Busch 1896), *quoted in* Beaney, *supra*, at 16 ("[U]pon all trials of said capital crimes, lawful challenges shall be allowed, and learned counsel assigned to the prisoners."); Act of Aug. 20, 1731, 43 Laws of the Province of S.C. 518-19 (Trott 1736), *quoted in* Beaney, *supra*, at 17 (stating that if a capital defendant "shall desire coun[sel], the court . . . is hereby authorized and required, immediately, upon his or their request, to assign . . . such and so many council not exceeding two, as the person or persons shall desire") (omissions in Beaney); 1791 N.H. Laws 247 (Melcher 1792), *quoted in* Beaney, *supra*, at 21 (stating that a capital defendant "shall at his request have counsel learned in the law assigned him by the court"); 2 Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 28, 1807, ch. 71 app. at 1049 (providing for assigned counsel for defendants accused and indicted for treason: "And in caſe any perſon or perſons, ſo accuſed and indicted, ſhall deſire council, the Court before whom ſuch perſon or perſons, ſhall be tried, or ſome Judge of that Court, ſhall, and is hereby authorized and required, immediately upon his or their requeſt, to aſſign to ſuch perſon or perſons, ſuch and ſo many council, not exceeding two, as the perſons ſhall deſire, to whom ſuch counsil ſhall have free acceſs at all ſeaſonable hours.") Act of 1719, ch. 22, § 4, 1 Del. Laws 64, 66 (S. Adams & J. Adams, 1797) (requiring counsel in capital cases: "And that upon all trials of the ſaid capital crimes, lawful challenges ſhall be allowed, and learned council aſſigned to the priſoners.").

providing the right to retain one's own counsel. See Beaney, *supra*, at 16-21.

The language of the Sixth Amendment, by contrast, made no mention of "assigned" or appointed counsel. This silence is particularly telling given that the 55 delegates to the Constitutional Convention were generally aware of the developments in State law at the time. See Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541, 542-43 (1989) (noting that the delegates "had wide experience" with the contemporary state constitutional debates). Moreover, the federal Constitution was modeled in many ways after State constitutions. *Id.* at 541-42. Accordingly, the Sixth Amendment's silence on the right to appointed counsel reveals that—unlike the State laws that explicitly required appointed counsel—the Amendment was not designed to impose such a requirement.

In all events, as these examples show, the "right to counsel" provided in the Sixth Amendment could not possibly have swept more broadly than the right to State-appointed counsel expressly provided in the most expansive State statutes. Thus, it could not have provided any right to appointed counsel in misdemeanor cases, even if it were read to create such a right with respect to some or all felonies.

C. The First Congress Interpreted The Amendment As Not Providing Government-Appointed Counsel.

Actions of the first Congress support the conclusion that the Sixth Amendment did not require appointed counsel. For example, the Judiciary Act of 1789, which was signed the day before the Sixth Amendment was proposed in Congress, contained the following provision: "[I]n all the courts of the United States, the parties may plead and manage their own causes personally *or* by the assistance of such counsel or

attorneys at law as by the rules of the said courts . . . shall be permitted to manage and conduct causes therein." Ch. 20, § 35, 1 Stat. 73, 92 (1789) (emphasis added). Unlike the State statutes providing for appointed counsel in some circumstances, the Judiciary Act made no mention of that subject. As Beaney noted, "If Congress had thought that the proposed Sixth Amendment counsel provision embodied a startling change from this statutory rule, some discussion concerning the proposal would undoubtedly have occurred on the floor." Beaney, *supra*, at 28.

Even more telling is a 1790 statute requiring that anyone indicted for treason or other capital crimes be offered "assigned counsel":

> [Such a defendant] shall also be allowed and admitted to make his full defense by counsel learned in the law; and the court before whom such person shall be tried . . . shall, and they *are hereby authorized and required immediately upon his request to assign to such person such counsel*, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours . . . .

Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118 (emphasis added).

The enactment of this statute contemporaneously with the Sixth Amendment quite clearly indicates that Congress did not believe the Sixth Amendment itself required "assigned" counsel in such cases. See Beaney, *supra*, at 28 (questioning why Congress would have passed this statute if it understood that the Sixth Amendment already provided this protection). For if the Sixth Amendment itself provided such a right, the right provided in the statute would have been both redundant and woefully under-inclusive. As this Court has repeatedly held, "[a]n Act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty

evidence of its true meaning.'" *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) (omission in original) (quoting *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)); see *Franklin* v. *Massachusetts*, 505 U.S. 788, 803-04 (1992) ("[I]nterpretations of the Constitution by the First Congress are persuasive."); *Bowsher* v. *Synar*, 478 U.S. 714, 723-24 & n.3 (1986) (listing 20 members of the first Congress who had been delegates to the Philadelphia Convention).

D. This Court's Earliest Decision Construing The Amendment's Counsel Provision Concluded That It Did Not Create A Right To Government-Provided Counsel.

This Court echoed this same view some 100 years later when it had what appears to have been its first opportunity to address expressly the scope of the Sixth Amendment's right-to-counsel clause. In *United States* v. *Van Duzee*, 140 U.S. 169, 173 (1891), the Court addressed a claim by several federal court clerks for reimbursement for the cost of providing copies of indictments to criminal defendants. This required the Court to determine whether such copies were required by the Sixth Amendment.

The Court held they were not. Under the Sixth Amendment, the Court held, "[t]here is . . . no general obligation on the part of the government either to furnish copies of indictments, summon witnesses or retain counsel for defendants or prisoners." *Id.* The Court reasoned that "[t]he object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to [criminal defendants]; but it was not contemplated that this should be done at the expense of the government." *Id.*

Given that this was (apparently) the first decision expressly interpreting this provision of the Bill of Rights, *Van Duzee* is entitled to significant weight. Like the other historical evidence discussed above, that decision casts substantial

doubt on the propriety of further expanding the federal right to appointed counsel.

III. A Holding That Misdemeanor Defendants Who Receive Only Suspended Sentences Are Entitled To State-Appointed Counsel Would Lead To Anomalous Treatment Of Indigent And Non-Indigent Defendants And Would Impose Significant Costs On States And Their Citizens.

Besides being unsupported by this Court's decisions or the text and history of the Sixth Amendment, the rule adopted by the Supreme Court of Alabama—mandating a Sixth Amendment right to State-funded counsel whenever a misdemeanor offender receives a suspended or probated sentence (see Pet. App. 35)—would create anomalous results and impose undue, significant burdens on States.

The States currently employ a broad array of approaches to government-appointed counsel. Some States have expanded the right to counsel for indigents charged with misdemeanors beyond what this Court has held to be the federal minimum, and thus provide a right to appointed counsel in a broader class of cases than that required by this Court's decisions. Specifically, some States and the District of Columbia appoint counsel for indigents charged with misdemeanors if a jail sentence is *authorized* or otherwise could result from a conviction.[7] Some States require the appointment of counsel for indigents when imprisonment, a substantial fine, or other "consequences of magnitude" could result.[8] Other States

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[7] District of Columbia, Hawaii, Louisiana, Massachusetts, Minnesota, Nebraska, New York, Oklahoma, Tennesse, Virginia, Washington, West Virginia, and Wisconsin. For the Court's convenience, a catalogue of the States' law on appointed counsel is annexed as an Appendix to this brief.

[8] Alaska, Kentucky, Maryland, New Jersey, and North Carolina. *See* Appendix.

appoint counsel for indigents charged with misdemeanors regardless of the penalty.[9]

But many States have not gone beyond the minimum federal requirements imposed by this Court's decisions. Several States, consistent with *Scott* and *Argersinger*, guarantee State-appointed counsel only if a defendant is actually imprisoned.[10] Several other states provide a right to appointed counsel in misdemeanor cases, but only if the authorized jail sentence exceeds a certain minimum, or only where certain other requirements are met.[11] Thus, in these states as well, the *Scott* and *Argersinger* rule provides a right to appointed counsel in some cases where State law does not. Expanding the federal appointed-counsel requirement would require these States, at a minimum, to change their procedures in some or all of their misdemeanor cases.

Although States are free to confer rights in excess of the constitutional minimum, the Court has been properly mindful that it "do[es] not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement." *Argersinger* v. *Hamlin*, 407 U.S. 25, 38 (1972). States may therefore choose to require and to fund a greater right to counsel than that required by the United States Constitution "based on their own constitutions or public policy." *Nichols* v. *United States*, 511 U.S. 738, 748 n.12 (1994). But the Court should not impose significant

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[9] California, Delaware, Indiana, Iowa, Oklahoma, and Oregon. *See* Appendix. Other States have unique approaches that appear to impose stricter requirements than those imposed in *Argersinger* and *Scott*: Connecticut, Illinois, Kansas, and Missouri. *See* Appendix.

[10] Alabama, Arkansas, Colorado, Florida, Georgia, Maine, Mississippi, Montana, North Dakota, Rhode Island, South Carolina, and Texas; *cf.* Vermont and Wyoming. *See* Appendix.

[11] Idaho, Michigan, New Hampshire, New Mexico, Ohio, Pennsylvania, and South Dakota. *See* Appendix. Several States apparently have not clearly decided the issue: Arizona, Nevada, and Utah. *See* Appendix.

burdens on all the States where, as here, there is no constitutionally significant liberty interest at stake, and where additional requirements would actually undermine federal and State policies.

A. The Rule Adopted Below Perversly Guarantees Indigent Defendants A Right To State-Appointed Counsel In Circumstances Where Similarly Situated Non-Indigents Would Not Hire Counsel For Themselves.

First, expanding the federal right to State-appointed counsel further from its core of providing counsel in capital cases, see *Powell* v. *Alabama*, 287 U.S. 45 (1932), and other felony cases, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), creates a real danger of undermining the equality rationale that undergirds those decisions. The Court's early decisions emphasized placing indigent defendants charged with serious crimes on an "equal" footing with non-indigent defendants such that the indigent would be entitled to counsel in cases where non-indigents would naturally hire their own counsel. See *Gideon*, 372 U.S. at 344-45; cf. *Powell*, 287 U.S. at 72-73. Yet the interpretation of the Sixth Amendment by the court below would mandate State-funded counsel for indigent defendants in circumstances where non-indigent defendants would be unlikely to hire their own counsel.

Indeed, a study by the United States Department of Justice confirms that many misdemeanor defendants already choose not to hire attorneys. That study found that, while only three of every 1000 felony defendants opt for self-representation, nearly 40 percent of misdemeanor defendants choose to forgo counsel, even when court-appointed counsel is available. Bureau of Justice Statistics, U.S. Dep't of Justice, *Defense Counsel in Criminal Cases* 1 (Nov. 2000). Moreover, the report indicates a sharp drop in the percentage of defendants who hire a private attorney when accused of a misdemeanor rather than a felony. One third of accused felons hire private attorneys, while less than one fifth of misdemeanor

defendants hire counsel. *Id.* at 3 tbl.2. In sum, non-indigent individuals are far more likely to represent themselves in misdemeanor cases than to hire counsel.

Thus, if the Court were to adopt the rule of constitutional law adopted by the Supreme Court of Alabama, one effect of that ruling would be "to favor defendants classified as indigents over those not so classified, yet who are in low-income groups where engaging counsel in a minor petty-offense case would be a luxury the family could not afford." *Argersinger*, 407 U.S. at 50 (Powell, J., concurring in result). This mandate would lead to the anomalous result that indigent defendants would be in a superior position, rather than an equal position, vis-à-vis most non-indigent defendants.

B. The Rule Adopted Below Imposes Significant Burdens On State Courts And Prosecutors And Undermines State Probation Systems And Recidivism Policies.

A rule granting misdemeanor defendants an expanded right to State-funded counsel also would greatly expand the burdens on State courts and prosecutors, and undermine State probation systems and recidivism policies.

1. As Justice Powell noted in *Argersinger*, "[t]here are thousands of [State] statutes and ordinances which authorize imprisonment for six months or less, usually as an alternative to a fine." 407 U.S. at 52 (Powell, J., concurring in result). Likewise, there are thousands of State statutes and ordinances amenable to suspended sentences. The offenses covered by these statutes include the "broad spectrum of petty-offense cases [that] daily flood[] the lower criminal courts" including "some of the most trivial of misdemeanors, ranging from spitting on the sidewalk to certain traffic offenses." *Id.*

One of the virtues of the *Scott-Argersinger* doctrine is that it permits judges to screen the most serious cases from the beginning, with the full realization that, if the case is proven, an indigent defendant may only be incarcerated if he has had

the opportunity for State-funded counsel. The rule adopted by the Supreme Court of Alabama would remove this discretion and significantly widen the circle of mandatory representation. In such a case, "nearly every misdemeanor sentence would be within the scope of 'actual imprisonment,'" thereby requiring a Sixth Amendment right to counsel. *People* v. *Reichenbach*, 587 N.W.2d 1, 7 (Mich. 1998). This possibility would greatly expand the right to counsel and place extensive additional burdens on States.

This rule, in turn, would have several implications for scarce State resources. First, "in many sections of the country, there simply will not be enough lawyers available to meet this demand either in the short or long term." *Argersinger*, 407 U.S. at 56 (Powell, J., concurring in result). This problem is likely to be particularly acute in rural areas.

Second, judicial resources will be overburdened with the inevitable "over lawyering" of relatively minor cases. See *id.* at 59 (Powell, J., concurring in result). "The absence of direct economic impact on the client, plus the omnipresent ineffective-assistance-of-counsel claim, frequently produces a decision to litigate every issue." *Id.* at 58. Moreover, "[i]t is likely that young lawyers, fresh out of school" will pursue every angle of relatively simple matters, thereby "stretching out . . . the process with consequent increased costs to the public." *Id.* at 58-59.

Third, an expanded appointed-counsel requirement would require States to hire additional lawyers. Many lesser crimes are currently not prosecuted by lawyers, but by, for example, an uncounseled police officer presenting the State's case. An expanded right to appointed counsel will create additional pressures for States to provide prosecutors in minor case. See *id.* at 49 (Powell, J., concurring in result) ("[G]overnment often does not hire lawyers to prosecute petty offenses; instead the arresting officer presents the case.").

An expanded right to appointed counsel will also inevitably require more State-funded defense lawyers. The costs of providing counsel to indigent defendants are already substantial. In 1999, for example, the one hundred largest counties spent $1.2 billion on indigent defense. U.S. Dep't of Justice, *Indigent Defense Services in Large Counties, 1999* 1 (Nov. 2000). Requiring states to provide defense counsel for misdemeanor defendants who receive only suspended or probated sentences of incarceration would send this figure still higher, placing significant mandatory burdens on States in cases where there is no constitutionally significant deprivation of a defendant's liberty.

2. The rule adopted by the court below could also interfere with State probation systems. As petitioner points out, courts in Alabama can impose probation only if they first sentence a defendant to a term of incarceration, and then suspend the sentence. Pet. Br. 15 n.5 (citing Ala. Code § 15-22-50). Under the Supreme Court of Alabama's view, judges in States with similar systems would have to provide counsel to indigent defendants, not only when they expect to impose a jail sentence, but also when they expect to sentence the defendant to probation if he or she is found guilty.

3. Finally, a rule invalidating suspended or conditional sentences could also gravely undermine the anti-recidivism policies of many States. Just as the United States Sentencing Guidelines permit the consideration of uncounseled misdemeanor convictions to enhance punishment in subsequent offences, see *Nichols*, 511 U.S. at 749, it is an important public policy of many States to punish recidivism by enhancing punishment in future cases based on criminal history. See, *e.g.*, *Parke* v. *Raley*, 506 U.S. 20, 26 (1992) (observing that recidivism laws "have a long tradition in this country that dates back to colonial times" and currently are in effect in all 50 States). Such policies deter crime even as they protect the public from the most dangerous criminals.

The Court's ruling in this case will likely have a significant impact on whether States can continue to utilize suspended sentences to enhance an offender's sentence for a subsequent offense. That is because sentences obtained in violation of the Sixth Amendment likely cannot be relied upon for sentence-enhancement purposes. See *Nichols*, 511 U.S. at 749 (holding that uncounseled misdemeanor conviction was valid under *Scott* because no prison term was imposed and, accordingly, could be used to enhance subsequent offenses). A rule invalidating a conditional or suspended sentence imposed on an uncounseled misdemeanor offender would undermine these State policies. In so doing, it would create an increased risk of harm from repeat offenders.

* * * *

This Court should reject the Supreme Court of Alabama's attempt to expand the right to appointed counsel beyond that recognized in *Argersinger* and *Scott*. That expansion has no basis in the text or history of the Sixth Amendment, in sound public policy, or in this Court's decisions. The line that this Court drew in those decisions is both clear and sound. It should be respected and enforced in this case.

CONCLUSION

For these reasons, the decision of the Supreme Court of Alabama should be reversed.

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APPENDIX

APPENDIX OF STATE AUTHORITIES

Alabama: Ala. R. Crim. P. 6.1(a) (providing that an indigent is entitled to appointment of attorney "in all criminal proceedings in which representation by counsel is constitutionally required").

Alaska: *Gregory* v. *State*, 550 P.2d 374, 378 (Alaska 1976) (providing indigent defendants with counsel "'when the penalty upon conviction of the misdemeanor may result in incarceration in a jail or penal institution, or the loss of a valuable license, or a fine so heavy as to indicate criminality'").

Arkansas: Ark. R. Crim. P. 8.2(b) (requiring appointment of counsel for indigents "unless [defendant] is charged with a misdemeanor and the court has determined that under no circumstances will imprisonment be imposed as a part of the punishment if he is found guilty").

Arizona: Ariz. R. Crim. P. 6.1(a) (providing that a defendant is "entitled to be represented by counsel . . . except . . . where there is no prospect of imprisonment or confinement"); but see *Neilson* v. *Superior Court*, 767 P.2d 1185, 1186 (Ariz. Ct. App. 1988) (holding that Rule 6.1(b) "is founded on" *Gideon* and *Argersinger*); *Campa* v. *Fleming*, 656 P.2d 619, 621 (Ariz. Ct. App. 1982) ("there is no authority that Arizona has standards which are more strict in this area than the U.S. Constitution").

California: Cal. Penal Code § 686; *Tracy* v. *Municipal Court*, 587 P.2d 227, 230 (Cal. 1978) (interpreting § 686 to guarantee appointed counsel to all indigent misdemeanor defendants).

Colorado: Colo. Rev. Stat. §§ 21-1-103, 16-5-501 (requiring the public defender to represent indigents, unless the prosecutor states in writing that he will not seek jail time upon conviction).

Connecticut: Conn. Gen. Stat. § 51-296 (providing counsel for indigent defendants wherever a sentence "will involve immediate incarceration or a suspended sentence of incarceration with a period of probation").

Delaware: Del. Code Ann. tit. 29, § 4602 (1997) ("The Public Defender shall represent, without charge, each indigent person who is under arrest or charged with a crime . . . .").

District of Columbia: D.C. Code Ann. §§ 11-2601, 11-2602 (providing appointed counsel for indigent defendant who "faces a loss of liberty").

Florida: Fla. R. Crim. P. 3.111(b)(1) (providing that appointment of counsel for an indigent charged with a misdemeanor is not required if the judge states in writing, before trial, that the defendant will not be imprisoned if convicted).

Georgia: *Brawner* v. *State*, 296 S.E.2d 551, 552 (Ga. 1982) ("A defendant in a misdemeanor *criminal* prosecution is entitled to counsel only where the defendant is sentenced to actual imprisonment.").

Hawaii: Haw. Rev. Stat. § 802-1 (providing indigent defendants with appointed counsel when "punishable by confinement in jail").

Idaho: Idaho Code § 19-852(a)(1) (requiring appointment of counsel for "needy person" charged with a "serious crime"); *id.* § 19-851(d)(2) (defining "serious crime" to include "any misdemeanor or offense the penalty for which, excluding imprisonment for non-payment of a fine, includes the possibility of confinement for more than six (6) months"); *State* v. *Hardman*, 818 P.2d 782, 785 (Idaho Ct. App. 1991).

Illinois: 725 Ill. Comp. Stat. 5/113-3(b) (providing appointed counsel to indigent defendants "[i]n all cases, except where the penalty is a fine only").

Indiana: Ind. Const. art. I, § 13; *Brunson* v. *State*, 394 N.E.2d 229, 231 (Ind. Ct. App. 1979) (interpreting § 13 to requiring appointed counsel "for all persons charged with a criminal misdemeanor, regardless of whether the charge ultimately results in the misdemeanant's imprisonment").

Iowa: Iowa R. Crim. P. 26 (providing indigents with the right to appointed counsel).

Louisiana: La. Const. art. I, § 13 (providing appointed counsel if defendant is "indigent and charged with an offense punishable by imprisonment").

Kansas: Kan. Stat. Ann. § 12-4405 (requiring appointed counsel where judge "has reason to believe that if found guilty, the accused person might be deprived of his or her liberty and is not financially able to employ counsel").

Kentucky: Ky. Rev. Stat. Ann. §§ 31.110(1), 31.100(4)(b) (providing appointed counsel to needy persons charged with "[a] misdemeanor or offense any penalty for which includes the possibility of confinement or a fine of five hundred dollars ($500) or more").

Maine: *State* v. *Cook*, 706 A.2d 603, 605 (Me. 1998) (holding, "consistent with the reasoning in *Scott*, that an indigent misdemeanor defendant has a right to counsel under . . . the Maine Constitution when imprisonment will actually be imposed").

Maryland: Md. Ann. Code art. 27A, §§ 2(h)(2), 4(b) (providing appointed counsel for indigent defendants "where constitutionally required" and where charged with a "[s]erious crime," including misdemeanors punishable by "the possibility of confinement for more than three months or a fine of more than $500").

Massachusetts: Mass. Sup. Jud. Ct. R. 3:10; Mass. R. Crim. P. 8 (stating that the court shall appoint counsel if the defendant is "charged with a crime for which a sentence of imprisonment . . . may be imposed").

Michigan: Mich. R. of Ct. 6.610(D)(2) (providing for appointed counsel for indigent defendant charged with an offense punishable by "more than 93 days in jail").

Minnesota: Minn. R. Crim. P. 5.02(2) (providing appointed counsel to indigent charged with "misdemeanor punishable by incarceration").

Mississippi: Miss. Code Ann. § 25-32-9(1) ("No . . . indigent . . . shall be imprisoned as a result of a misdemeanor conviction unless he was represented by the public defender or waived the right to counsel."); see also *id.* § 99-15-15 (providing for the appointment of counsel).

Missouri: Mo. Rev. Stat. § 600.042.4.(2) (requiring appointment of counsel for indigents, *inter alia*, charged with a misdemeanor "which will probably result in confinement in the county jail upon conviction").

Montana: Mont. Code Ann. § 46-8-101(3)(b) ("The defendant, if unable to employ counsel, is entitled to have counsel assigned if . . . the offense charged is a misdemeanor and the court desires to retain imprisonment as a sentencing option . . . .").

Nebraska: Neb. Rev. Stat. Ann. § 29-3902 (providing appointed counsel for indigent defendants "in misdemeanor cases punishable by imprisonment").

Nevada: Nev. Rev. Stat. Ann. § 171.188(3)(b) (providing for appointment of counsel where "required"); *id.* § 178.397 (providing appointed counsel for every indigent defendant "accused of a gross misdemeanor or felony").

New Hampshire: N.H. Rev. Stat. Ann. §§ 604-A:2, 625:9 (providing appointed counsel where defendant charged with a felony or Class A misdemeanor in which maximum punishment one year); *State* v. *Scarborough*, 470 A.2d 909, 913 (N.H. 1983) (noting New Hampshire's right to appointed counsel "covers a broader range of criminal defendants than . . . the Sixth and Fourteenth Amendments").

New Jersey: *Rodriguez* v. *Rosenblatt*, 277 A.2d 216, 223 (N.J. 1971) (holding that counsel should be appointed for indigents when conviction "entail[s] imprisonment in fact or other consequence of magnitude").

New Mexico: N.M. Stat. Ann § 31-16-3(A) (providing appointed counsel to indigent defendants accused of "a serious crime," including misdemeanor carrying "a possible penalty of confinement for more than six months").

New York: N.Y. Crim. Proc. Law § 170.10(3)(c) (providing for assigned counsel to indigent defendants, except for traffic infractions).

North Carolina: N.C. Gen. Stat. § 7A-451(a)(1) (providing that, among other things, an indigent is entitled to counsel if conviction carries a penalty or imprisonment with a fine of $500 or more).

North Dakota: N.D. R. Crim. P. 44 ("[E]very indigent defendant is entitled to have counsel appointed at public expense . . . unless the magistrate has determined that sentence upon conviction will not include imprisonment.").

Ohio: Ohio R. Crim. P. 2, 44(A) (requiring appointed counsel to defendant charged with "a serious offenses," including misdemeanors punishable by more than six months confinement); see *id.* 44(B) (prohibiting imposition of "sentence of confinement" on defendant charged with petty offense who is unable to obtain counsel).

Oklahoma: Okla. Stat. tit. 22, § 1355.6.A (providing appointed counsel to all indigent defendants who are charged with an offense "punishable by incarceration").

Oregon: Or. Rev. Stat. § 135.050(4) (providing for court-appointed counsel for all "indigents charged with a crime").

Pennsylvania: Pa. R. Crim. P. 316 (providing for assigned counsel in all "summary cases" for "all defendants who are without financial resources or who are unable to employ counsel when there is a likelihood that imprisonment will be imposed" and in all "court cases"); see 18 Pa. Cons. Stat. § 106(c)(2) (defining summary offenses to include offenses providing for a maximum of 90 days imprisonment).

Rhode Island: *In re Advisory Opinion to the Governor*, 666 A.2d 813, 818 (R.I. 1995) (advising the Governor that the Court's interpretation of the Sixth Amendment in *Argersinger*, *Scott*, and *Nichols* "as a guarantee of a criminal defendant's right to counsel only when imprisonment is actually imposed represents the appropriate standard that should be applied under . . . the Rhode Island Constitution").

South Carolina: S.C. Code Ann. § 17-3-10 (providing counsel to any defendant "financially unable to retain counsel" and "entitled to counsel under the Constitution of the United States"); S.C. App. Ct. R. 602 (informing accused of right to counsel "if a prison sentence is likely to be imposed following any conviction").

South Dakota: S.D. Codified Laws §§ 22-6-2, 23A-40-6.1 (no appointed counsel is required for indigent defendant who is not in custody and for whom court has stated on the record that no incarceration shall be imposed following any conviction, when charged with crime with a maximum penalty of thirty days imprisonment and/or $200 fine).

Tennessee: *Allen* v. *McWilliams*, 715 S.W.2d 28, 32 (Tenn. 1986) (amending Supreme Court Rule 13 to provide appointed counsel in all cases where misdemeanor defendant "is in jeopardy of incarceration").

Texas: Tex. Crim. Proc. Code Ann. § 26.04 (providing for the appointment of counsel whenever an indigent is charged with a misdemeanor punishable by imprisonment); *Fortner* v. *State*, 764 S.W.2d 934, 935 (Tex. App. 1989) (interpreting article 26.04 "to require the appointment of counsel only when the court knows that the punishment it will assess includes imprisonment or when the trial is before the jury and the possible punishment includes imprisonment").

Utah: Utah R. Crim. P. 8(a) (providing appointed counsel where indigent defendant "faces a substantial probability of deprivation of liberty"); *Webster* v. *Jones*, 587 P.2d 528, 530 (Utah 1978) ("[W]here a person is charged with an offense which may be punished by imprisonment, he is entitled to the assistance of [court-appointed] counsel"); cf. *Layton City* v. *Longcrier*, 943 P.2d 655, 658 (Utah Ct. App. 1997) (stating that no counsel was required where the sentence was suspended because "*Scott* establishes an after-the-fact test that requires a reviewing court to find an uncounselled misdemeanor conviction constitutional when the defendant was not sentenced to jail").

Vermont: Vt. Stat. Ann. tit. 13, §§ 5201, 5231 (providing assigned counsel to needy defendants charged with a "serious crime," including "[a] misdemeanor the maximum penalty for which is a fine of more than $1,000.00 or any period of imprisonment unless the judge, at the arraignment but before the entry of a plea, determines and states on the record that he will not sentence the defendant to a fine of more than $1,000.00 or a period of imprisonment if the defendant is convicted of the misdemeanor").

Virginia: Va. Code Ann. §§ 19.2-159, 19.2-160 (providing appointed counsel to indigents charged with crime that may be punishable by imprisonment).

Washington: Wash. Super. Ct. Crim. R. 3.1(a), (d) (providing for assignment of appointed counsel to indigents in "all criminal proceedings for offenses punishable by loss of liberty").

West Virginia: W. Va. Code § 50-4-3 (providing for appointment of counsel to indigents in any criminal proceeding where the applicable statutes "authorize a sentence of confinement").

Wisconsin: Wis. Stat. § 967.06 (providing indigent defendants with appointed counsel in "any offense which is punishable by incarceration").

Wyoming: Wyo. Stat. Ann. §§ 7-6-102, 7-6-104 (providing indigent defendants with appointed counsel in all "serious crime[s]," including a "misdemeanor . . . for which incarceration as a punishment is a practical possibility, provided, however, that counsel need not be appointed for a misdemeanor if the judge, at the initial appearance, determines and states on the record that he will not sentence the defendant to any period of imprisonment if the defendant is convicted of the misdemeanor").